

Chapter II: Entry of third-country nationals
2. Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries
whose nationals must be in possession of visas when crossing the external borders
and those whose nationals are exempt from that requirement
OJ L 81, 21.3.2001, p. 1, last amended by OJ L 336, 18.12.2009, p. 1

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Dieser Beitrag wurde erstmals wie folgt veröffentlicht:

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A. Text

Preamble

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 62, point para. (2)(b)(i) thereof,

Having regard to the proposal from the Commission, *

Having regard to the opinion of the European Parliament, **

Whereas:

(1) Under Article 62, point para. (2)(b) of the Treaty, the Council is to adopt rules relating to visas for intended stays of no more than three months, and in that context it is required to determine the list of those third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement. Article 61 cites those lists among the flanking measures which are directly linked to the free movement of persons in an area of freedom, security and justice.

(2) This Regulation follows on from the Schengen acquis in accordance with the Protocol integrating it into the framework of the European Union, hereinafter referred to as the "Schengen Protocol". It does not affect Member States' obligations deriving from the acquis as defined in Annex A to Decision 1999/435/EC of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis. ***

(3) This Regulation constitutes the further development of those provisions in respect of which closer cooperation has been authorised under the Schengen Protocol and falls within the area referred to in Article 1, point B, of Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of

* OJ C 177 E, 27.06.2000, p. 66.

** Opinion of 5 July 2000 (not yet published in the Official Journal).

*** OJ L 176, 10.7.1999, p. 1.

Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis.****

(4) Pursuant to Article 1 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland and the United Kingdom are not participating in the adoption of this Regulation. Consequently and without prejudice to Article 4 of the aforementioned Protocol, the provisions of this Regulation apply neither to Ireland nor to the United Kingdom.

(5) The determination of those third countries whose nationals are subject to the visa requirement, and those exempt from it, is governed by a considered, case-by-case assessment of a variety of criteria relating *inter alia* to illegal immigration, public policy and security, and to the European Union's external relations with third countries, consideration also being given to the implications of regional coherence and reciprocity. Provision should be made for a Community mechanism enabling this principle of reciprocity to be implemented if one of the third countries included in Annex II to this Regulation decides to make the nationals of one or more Member States subject to the visa obligation.

(6) As the Agreement on the European Economic Area exempts nationals of Iceland, Liechtenstein and Norway from the visa requirement, these countries are not included in the list in Annex II hereto.

(7) As regards stateless persons and recognised refugees, without prejudice to obligations under international agreements signed by the Member States and in particular the European Agreement on the Abolition of Visas for Refugees, signed at Strasbourg on 20 April 1959, the decision as to the visa requirement or exemption should be based on the third country in which these persons reside and which issued their travel documents. However, given the differences in the national legislation applicable to stateless persons and to recognised refugees, Member States may decide whether these categories of persons shall be subject to the visa requirement, where the third country in which these persons reside and which issued their travel documents is a third country whose nationals are exempt from the visa requirement.

(8) In specific cases where special visa rules are warranted, Member States may exempt certain categories of persons from the visa requirement or impose it on them in accordance with public international law or custom.

(9) With a view to ensuring that the system is administered openly and that the persons concerned are informed, Member States should communicate to the other Member States and to the Commission the measures which they take pursuant to this Regulation. For the same reasons, that information should also be published in the *Official Journal of the European Communities*.

(10) The conditions governing entry into the territory of the Member States or the issue of visas do not affect the rules currently governing recognition of the validity of travel documents.

(11) In accordance with the principle of proportionality stated in Article 5 of the Treaty, enacting a Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders, and those whose nationals are exempt from that requirement, is both a necessary and an appropriate means of ensuring that the common visa rules operate efficiently.

(12) This Regulation provides for full harmonisation as regards the third countries whose nationals are subject to the visa requirement for the crossing of Member States' external borders, and those whose nationals are exempt from that requirement,

HAS ADOPTED THIS REGULATION:

Formatiert: Abstand Vor: 0 Pt., Nach: 0 Pt.

**** OJ L 176, 10.7.1999, p. 31.

B. Literature

Bigo, Didier/Guild, Elspeth, Policing at a distance: Schengen visa policies, in: *Bigo, Didier/Guild, Elspeth* (eds.), *Controlling frontiers: free movement into and within Europe*, Ashgate Publishing 2005, 233-263. *Bigo, Didier/Guild Elspeth*, Le visa Schengen: expression d'une stratégie de police à distance, *Cultures et conflits*, 2004. *Bigo, Didier/Guild, Elspeth*, La mise à l'écart des étrangers: les effets du visa Schengen, *l'Harmattan* 2003. *Cholewinski, Richard*, *Borders and Discrimination in the European Union*, published by Migration Policy Group and the Immigration Law Practitioners Association (ILPA), 2002. *Cholewinski, Ryszard*, *Borders and Discrimination in the European Union*, in: *Anderson, Malcolm/Apap, Joanna* (eds.), *Police and Justice Co-operation and the New European Borders*, *European Monographs Vol. 40*, Kluwer, 2002, 81-102. *Garcia-Jourdan, Sophie*, L'émergence d'un espace européen de liberté, de sécurité et de justice, *Bruylant* 2005. *Guild, Elspeth*, The Border Abroad: Visa and Border Controls, in: *Groenendijk, Kees/Guild, Elspeth/Minderhoud, Paul* (eds.), *In Search of Europe's Borders*, *Kluwer Law International*, 2000, 87-105. *Hailbronner, Kay*, *Immigration and Asylum Law and Policy of the European Union*, *Kluwer Law International*, 2000, 129-160. *Heimann, Josef*, „Visa, Asyl, Einwanderung und andere Politiken betreffend den freien Personenverkehr“ – der neue Titel IV EGV unter besonderer Berücksichtigung des Schengen-Protokolls, *ZERP Diskussionspapier 2/99*. *Meloni, Annalisa*, The Development of a Common Visa Policy under the Treaty of Amsterdam, *CMLR* 2005, 1357-1381. *Meloni, Annalisa*, *Visa Policy within the European Union Structure*, *Springer* 2006. *Meloni, Annalisa*, The community Code on Visas : Harmonisation at last ?, *ELR* 2009, 671 et seqq. *Peers, Steve/Rogers, Nicola*, Visa List, in: *Peers, Steve/Rogers, Nicola* (eds.), *EU Immigration and Asylum Law, Text and Commentary*, *Immigration and Asylum Law and Policy in Europe Vol. 12*, *Martinus Nijhoff Publishers* 2006, 185-200. *Peers, Steve/Rogers, Nicola*, Visa Policy, in: *Peers, Steve/Rogers, Nicola* (eds.), *EU Immigration and Asylum Law, Text and Commentary*, *Immigration and Asylum Law and Policy in Europe Vol. 12*, *Martinus Nijhoff Publishers* 2006, 201-218. *Peers, Steve*, Visas and Border Controls, in: *ibid.*, *Justice and Home Affairs*, 2nd ed., *Oxford EC Law Library*, *Oxford University Press*, 2006, 93-181. *Peers, Steve*, From black Market to Constitution: The Development of the Institutional Framework for EC Immigration and Asylum Law, in: *Peers, Steve/Rogers, Nicola* (eds.), *EU Immigration and Asylum Law, Text and Commentary*, *Immigration and Asylum Law and Policy in Europe Vol. 12*, *Martinus Nijhoff Publishers* 2006, 19-45. *ter Steeg, Marcus*, Das Einwanderungskonzept der EU, Zwischen politischem Anspruch, faktischen Regelungsbedürfnissen und den primärrechtlichen Grenzen in Titel IV des EG-Vertrages, *Schriftenreihe Europäisches Recht, Politik und Wirtschaft*, Band 321, *Nomos Verlag* 2005, 397-402.

C. Interpretation

CHAPTER I

General provisions

Article 1

1. Nationals of third countries on the list in Annex I shall be required to be in possession of a visa when crossing the external borders of the Member States.

Without prejudice to the requirements stemming from the European Agreement on the Abolition of Visas for Refugees signed at Strasbourg on 20 April 1959, recognised refugees and stateless persons shall be required to be in possession of a visa when crossing the external borders of the Member States if the third country in which they are resident and which has issued them with their travel document is a third country listed in Annex I to this Regulation.

2. Nationals of third countries on the list in Annex II shall be exempt from the requirement set out in paragraph 1 for stays of no more than three months in all.

The following shall also be exempt from the visa requirement:

— the nationals of third countries listed in Annex I to this Regulation who are holders of a local border traffic card issued by the Member States pursuant to Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention^{*} when these holders exercise their right within the context of the Local Border Traffic regime;

— school pupils who are nationals of a third country listed in Annex I and who reside in a Member State applying Council Decision 94/795/JHA of 30 November 1994 on a joint action adopted by the Council on the basis of Article K.3.2.b of the Treaty on European Union concerning travel facilities for school pupils from third countries resident in a Member State^{**} and are travelling in the context of a school excursion as members of a group of school pupils accompanied by a teacher from the school in question;

— recognised refugees and stateless persons and other persons who do not hold the nationality of any country who reside in a Member State and are holders of a travel document issued by that Member State.

3. Nationals of new third countries formerly part of countries on the lists in Annexes I and II shall be subject respectively to the provisions of paragraphs 1 and 2 unless and until the Council decides otherwise under the procedure laid down in the relevant provision of the Treaty.

4. Where a third country listed in Annex II introduces a visa requirement for nationals of a Member State, the following provisions shall apply:

(a) within 90 days of such introduction, or its announcement, the Member State concerned shall notify the Council and the Commission in writing; the notification shall be published in the C series of the *Official Journal of the European Union*. The notification shall specify the date of implementation of the measure and the type of travel documents and visas concerned.

^{*} OJ L 405, 20.12.2006, p.1.

^{**} OJ L 327, 19.12.1994, p.1.

If the third country decides to lift the visa obligation before the expiry of this deadline, the notification becomes superfluous;

(b) the Commission shall immediately after publication of that notification and in consultation with the Member State concerned, take steps with the authorities of the third country in order to restore visa-free travel;

(c) within 90 days after publication of that notification, the Commission, in consultation with the Member State concerned, shall report to the Council. The report may be accompanied by a proposal providing for the temporary restoration of the visa requirement for nationals of the third country in question. The Commission may also present this proposal after deliberations in Council on its report. The Council shall act on such proposal by a qualified majority within three months;

(d) if it considers it necessary, the Commission may present a proposal for the temporary restoration of the visa requirement for nationals of the third country referred to in subparagraph (c) without a prior report. The procedure provided for in subparagraph (c) shall apply to that proposal. The Member State concerned may state whether it wishes the Commission to refrain from the temporary restoration of such visa requirement without a prior report;

(e) the procedure referred to in subparagraphs (c) and (d) does not affect the Commission's right to present a proposal amending this Regulation in order to transfer the third country concerned to Annex I. Where a temporary measure as referred to in subparagraphs (c) and (d) has been decided, the proposal amending this Regulation shall be presented by the Commission at the latest nine months after the entry into force of the temporary measure. Such a proposal shall also include provisions for lifting of temporary measures, which may have been introduced pursuant to the procedures referred to in subparagraphs (c) and (d). In the meantime the Commission will continue its efforts in order to induce the authorities of the third country in question to reinstall visa-free travel for the nationals of the Member State concerned;

(f) where the third country in question abolishes the visa requirement, the Member State shall immediately notify the Council and the Commission to that effect. The notification shall be published in the C series of the *Official Journal of the European Union*. Any temporary measure decided upon under subparagraph (d) shall terminate seven days after the publication in the Official Journal.

In case the third country in question has introduced a visa requirement for nationals of two or more Member States the termination of the temporary measure will only terminate after the last publication.

5. As long as visa exemption reciprocity continues not to exist with any third country listed in Annex II in relation to any of the Member States, the Commission shall report to the European Parliament and the Council before the 1 July of every even-numbered year on the situation of non-reciprocity and shall, if necessary, submit appropriate proposals.

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I. General remarks

1. Introduction

- 1 Regulation 539/2001¹ harmonises the lists of third countries whose citizens are required to be in possession of a visa in order to cross the external borders of the European Union,² and of third countries whose nationals are exempt from this requirement.³ It entered into force on 10 April 2001, and has since been amended by six regulations and one Act of Accession.⁴
- 2 The regulation is part of the European Union’s visa law and policy. Other measures in this field include⁵ rules on a uniform format of visa,⁶ the issue of visa at the border,⁷ on a visa information database (VIS)⁸ and instructions on the application of the common conditions and procedures for the issuance of visas.⁹

¹ Council Regulation (EC) no. 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 81/1 (2001) (hereinafter: Regulation 539/2001).

² Annex I of Regulation 539/2001.

³ Annex II of Regulation 539/2001.

⁴ See *infra* marg. no. 24.

⁵ Cf. *Garcia-Jourdan*, Liberté, sécurité, justice, p. 176 et seqq. and the list of visa legislation *op. cit.* p. 702 et seqq.

⁶ Council Regulation (EC) no. 1683/95 of 29 May 1995 laying down a uniform format for visas, OJ L 164/1 (1995); later amended, a consolidated version is available on:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1995R1683:20070101:EN:PDF>, (last access: 13 January 2010).

⁷ Council Regulation (EC) no. 415/2003 of 27 February 2003 on the issue of visas at the border, including the issue of such visas to seamen in transit, OJ L 64/1 (2003).

⁸ Council Decision of 8 June 2004 establishing the Visa Information System (VIS), OJ L 213/5 (2004); Regulation (EC) no. 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), OJ L 218/60 (2008).

⁹ Common Consular Instructions on visas for the diplomatic missions and consular posts (consolidated version of 7 November 2005), OJ C 326/1 (2005); later updates were made but not published in the Official Journal in December 2007, December 2008 and February 2009. First published in the Official Journal as Decision of the Executive Committee of 28 April 1999 on the definitive versions of the Common Manual and the Common Consular Instructions (SCH/Com-ex (99) 13), OJ L 239/317 (2000).

- 3 The EU Code on visas¹⁰ integrates most legal measures in this field (with the exception of Regulation 539/2001) and parts of the Common Consular Instructions (CCI) in one single regulation with the goal of enhancing transparency and legal certainty and of avoiding differences in the application of the rules by different Member States by closing existing legal gaps.¹¹ So, the new Regulation establishes the procedures and conditions for issuing visas for transit through or intended stays in the territory of the Member States not exceeding three months in any six-months period.
- 4 The Common Consular Instructions (CCI) which contain detailed explanations and rules on the application process, the examination of applications, and the issuance of visas, are of particular importance in the field of visa policy. The CCI aim to harmonize the practises of the common visa rules by the Schengen states. The CCI have originally been adopted by the Schengen Executive Committee, and were later integrated into the European Union framework by the Treaty of Amsterdam as part of the Schengen acquis.¹²
- 5 After the entry into force of the Treaty of Amsterdam, the Council adopted Regulation 789/2001¹³ which conferred power to the Council to amend almost all the rules of the CCI by means of a simplified procedure and since 2005 deciding by qualified majority voting.¹⁴ The CCI have since been modified numerous times by Council decisions and also by a number of legislative acts,¹⁵ and consolidated versions have been published in the Official Journal.¹⁶
- 6 At least these modifications are to be considered binding as EU law (as provisions of a decision or regulation) since they have been adopted in the correct form and according to the procedure prescribed in the Treaty. The legal effects of the other provisions that have not been

¹⁰ Draft proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas, 19 July 2006, COM (2006) 403 final. Regulation (EC) no. 810/2009 establishing a Community Code on Visas (Visa Code), OJ L 243/1 (2009). Cf. to this new Regulation *Meloni*, EL Rev. 2009, p. 671 et seqq.

¹¹ Cf. Explanatory Memorandum to the Commissions Proposal for the Community Code on Visas (note 10), p. 2 et seqq.

¹² Cf. Council Decision 1999/435/EC of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on the European Union, the legal basis for each of the provisions or decisions which constitute the aquis, OJ L 176/1 (1999), Annex A, p. 7.

¹³ Council Regulation (EC) no. 789/2001 of 24 April 2001 reserving the Council implementing powers with regard to certain details provisions and practical procedures for examining visa applications, OJ L 116/2 (2001).

¹⁴ *Peers*, EU Justice and Home Affairs Law, p. 162.

¹⁵ Cf. for example art. 7 para. 2 of Regulation 539/2001. See also *Peers*, EU Justice and Home Affairs Law, p. 162, note 488 for more examples.

¹⁶ See the references in note 9.

modified and of the totality of the CCI remain, however, unclear. Their legal effects have not been clearly defined in the decision of the incorporation of the Schengen acquis, and the CCI have up to date not been replaced in its entirety by a legislative act of the European Union.

7 The CCI do not conform to any of the legal forms listed in art. 288 TFEU, but this does not change the fact that they are binding for the authorities of the Member States that are applying them (i.e. the diplomatic missions and consular posts). They have been integrated into the framework of the European Union by the Treaty of Amsterdam, and since only been amended by legal acts of the European Union, which speaks in favour of their binding legal power. It would, however, serve legal certainty if the binding character of the CCI were clearly stated.

2. Territorial scope

8 Regulation 539/2001 is applicable to Denmark,¹⁷ but not to the UK and Ireland.¹⁸ Based on agreements concluded with Norway, Iceland,¹⁹ and Switzerland²⁰ on their association to the Schengen acquis, the regulation is also applicable to these non-EU Member states.²¹ The principality of Liechtenstein is planning to join the Schengen area in the near future.²²

3. Purpose

9 The visa law and policy are – in comparison with other fields covered by art. 77 et seqq. TFEU – of a rather technical character. It is therefore not very surprising that the Member States could already agree at a quite early point in time on the basic concepts of a common visa policy, and established not only a legal basis in the EC Treaty in 1992 but have also adopted secondary measures acting on that basis rather speedily.²³ Regulation 539/2001 is an important part of the visa policy establishing a „negative list“ (states whose nationals are required to be in possession of a visa) and a „positive list“ (states whose nationals are exempt from that requirement).

¹⁷ See *Peers*, Visas and Border Controls, p. 117.

¹⁸ See *Peers*, Visas and Border Controls, p. 115 et seqq.

¹⁹ Agreement with Iceland and Norway of 17 May 1999 concerning the latter's' association with the implementation, application and development of the Schengen acquis, OJ L 176/35 (1999).

²⁰ Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, OJ L 53/52 (2008).

²¹ Cf. *Peers*, Visas and Border Controls, p. 129.

²² Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, 2006/0251 (CNS), not yet ratified.

²³ Cf. also the remarks on the drafting history, II.

- 10 The visa policy is furthermore closely connected to the realization of the common market and the removal of controls at internal borders since an individual who is granted entry into one Schengen state can afterwards freely move into the territories of the other Schengen states. The common visa policy shall also help combating illegal migration: The establishment of a “negative list” which requires nationals of a majority of third states to apply for a visa allows a shift of the examination whether the legal conditions for entry are fulfilled away from the actual frontiers to the diplomatic missions and consular post in the country of origin or legal residence. The hope is that by reducing the number of persons who would eventually present themselves at the actual external borders, the number of persons entering the Schengen area illegally could also be reduced.²⁴ If and to what extent the establishment of “negative” visa lists is an efficient means of combating illegal migration would have to be examined empirically - an endeavour that would by its very nature meet significant practical difficulties.
- 11 Furthermore it has to be considered that visa requirements can constitute high administrative obstacles for the persons concerned, and can result – especially for persecuted persons or persons in need – in the actual impossibility of fleeing from persecution or of getting the (for example medical) help needed.²⁵

4. Direct applicability and individual rights

- 12 Regulation 539/2001 has because of its very nature as regulation direct effect in the Member States and its provisions must be applied by the national authorities. The responsible national authorities must refer to the rule established in art. 1 Regulation 539/2001 when deciding whether a person needs a visa in order to enter the Member State concerned.
- 13 Nevertheless, it needs to be pointed out that certain provisions of Regulation 539/2001 require implementation measures at the national level. This is the case with respect to art. 4 Regulation 539/2001 – that allows Member States to provide for exceptions for certain groups of persons – as well as with respect to the determination of the national authority responsible for the application of this regulation (art. 5; furthermore and going beyond this provision, the responsible authority for the examination of visa applications and the actual issuance of visas also need to be determined).
- 14 If and to what extent certain provisions of this regulation grant individual rights is of particular importance for persons who according to art. 1 para. 2 Regulation 539/2001 in conjunction with Annex I are exempt from the visa requirement. The European Court of

²⁴ Cf. *Bigo/Guild*, Policing at a Distance, p. 236 et seqq.

²⁵ See *Bigo/Guild*, Policing at a Distance, p. 233 et seqq.

Justice has in its rulings protected individual rights flowing from EU law in cases where the provisions of EU law also aim at the protection of the interest of the individual,²⁶ irrespective of the question if the actual wording of the rule stated a corresponding obligation of the Member States. The question whether a certain provision of primary law, of a directive or a regulation establishes individual rights needs in principle be answered by applying the same criteria.²⁷

15 With this in mind, it becomes clear that art. 1 para. 2 Regulation 539/2001 in particular establishes individual rights: According to this provision, nationals of certain states are exempt from the visa requirement, which clearly protects the interest of individuals since the concerned individuals may have a great interest in visa-free travel into the Schengen area. This conclusion is in no way affected by the fact that the beneficiaries are not determined by individual criteria but on the basis of the rather formal criteria of their nationality. There is no reason why individual rights might not also be established by using such formal criteria for delimiting the group of individuals concerned. Individuals can therefore invoke this right if they are refused entry into the Schengen area (solely) based on the lack of a visa – despite the fact that they are exempt from the visa requirement. They must be given the possibility to invoke this right before a court.

16 These principles have to be considered in the context of art. 5 Regulation 562/2006 (Schengen Borders Code)²⁸ that establishes the conditions of entry into the Schengen area: Independent of whether that provision grants a right of entry if its conditions are fulfilled,²⁹ art. 1 para. 2 Regulation 539/2001 in conjunction with art. 5 para. 1 Regulation 562/2006 prohibits the refusal of entry on the basis of the lack of visa that the individual is not required to be in possession of according to Regulation 539/2001.

²⁶ Cf. EJC, judgement of 12 December 1996, case C-298/95, *Commission v. Federal Republic of Germany*, ECR (1996) I-6755, paras. 15 et seq.; EJC, judgement of 23 May 2000, *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v. Københavns Kommune*, case C-209/98, ECR (2000) I-3743, paras. 100 et seq.; ECJ, judgement of 25 July 2008, *Dieter Janecek v. Bavaria*, case C-237/07, not yet published in ECR.

²⁷ See on this extensively Epiney, *Primär- und Sekundärrechtsschutz im Öffentlichen Recht*, Vereinigung der Deutschen Staatsrechtslehrer 2002 (61), p. 361, 386 et seqq.

²⁸ Regulation (EC) no. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105/1 (2006).

²⁹ Cf. *Epiney/Egbuna-Joss*, Commentary of Regulation 562/2006, in this volume.

- 17 It is obvious that the possession of a visa for nationals of states listed in Annex I alone does not imply the right of entry; entry into the Schengen area may only be granted if the other requirements stated in art. 5 Regulation 562/2006 are met as well.³⁰
- 18 With respect to those third country nationals that need a visa (art. 1 para. 1 Regulation 539/2001) the issue is raised if they can invoke a “right to be issued a visa”. On the basis of Regulation 539/2001 the answer to this question has to be in the negative, since the regulation only establishes which third country nationals need a visa and which do not, but does not contain the conditions for the issuance of visas. Even though the Member States have quite a large margin of discretion when deciding on the issuance of visas, they need to respect the limits put on the exercise of that discretion by EU law, and especially by the fundamental rights recognized in EU law (as for example the prohibition of discrimination).³¹ If a visa applicant invokes the violation of a fundamental right, he has the right to a legal remedy as the fundamental rights clearly codify individual rights.

II. Drafting history

- 19 As part of the harmonization and strengthening of external borders control, the 1985 Schengen Agreement³² contained in its art. 7 an obligation for the State parties to approximate their visa policies.³³ The 1990 Convention implementing the 1985 Schengen Agreement (hereinafter: Schengen Implementation Convention, SIC)³⁴ provided for common conditions to be fulfilled by third country nationals wanting to cross the external borders for a stay of up to three months (art. 5 SIC).³⁵ Title II, Chapter 3 (art.s 9 et seqq. SIC) contained a more detailed obligation for the State parties to harmonise their visa policy (art. 9 SIC)³⁶ and to

³⁰ Cf. *Epiney/Egbuna-Joss*, Commentary of Regulation 562/2006, in this volume.

³¹ Cf. ECJ, judgement of 18 June 1991, case C-260/89, *ERT v. DEP et al.*, ECR (1991), I-2925, paras. 41 et seqq.; ECJ, judgement of 12 June 2003, case C-112/00, *Schmidberger v. Austria*, 2003 ECR (2003), I-5659, paras. 69 et seqq.; particularly with regard to regulations ECJ, case C-5/88, *Wachauf v. Federal Republic of Germany*, ECR (1989) I-2609, para. 19; ECJ, judgement of 13 April 2000, case C-292/97, *Karlsson v. Sweden*, ECR (2007) I-2737, para. 37.

³² Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239/13 (2000).

³³ See *Meloni*, Visa Policy, p. 55 et seqq.; *Peers*, Visas and Border Controls, p. 97 et seq.

³⁴ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239/19 (2000).

³⁵ See *Meloni*, Visa Policy, p. 58 et seqq.; *Peers*, Visas and Border Controls, p. 151 et seqq.; *ter Steeg*, Einwanderungskonzept, p. 81 et seq.

³⁶ See *Meloni*, Visa Policy, p. 56 et seq.

introduce a uniform visa valid for the territories of all State parties (art. 10 et seqq. SIC).³⁷ Detailed rules for the issuance of Schengen Visa pursuant to Chapter 3 SIC were agreed upon by the participating states and laid down in the Common Consular Instructions on visas for the diplomatic missions and consular posts (CCI).³⁸

20 The 1985 Schengen Agreement and the 1990 Schengen Convention were not negotiated in the institutional framework of the EC even though all the State parties were EC Member States. It was not until the Treaty of Maastricht establishing the European Union entered into force in 1992 and declared the visa policy to be a matter of common interest, that the European Community was given the competence to adopt measures in the field of visa policy.³⁹

21 Former Art. 100c EC Treaty conferred the power upon the European Community to adopt a common list of countries whose nationals needed to be in possession of a visa when crossing the external borders (“negative list”),⁴⁰ and the Union first made use of this competence in 1995 by adopting Regulation 2371/1995.⁴¹ That regulation was annulled by the European Court of Justice for failure to consult the European Parliament.⁴² It was later replaced by Regulation 574/1999⁴³ which essentially copied the wording of the annulled regulation.

22 In 1999, the Schengen acquis was incorporated into the Union’s framework by the Treaty of Amsterdam and a protocol annexed to the treaty.⁴⁴ The protocol conferred the competence to the Council to implement the provisions of the protocol. The Council in a first step defined

³⁷ See *Meloni*, Visa Policy, p. 57 et seq.; *ter Steeg*, Einwanderungskonzept, p. 79 et seq.

³⁸ See references *supra* note 9; *Peers*, Visas and Border Controls, p. 153 et seqq.

³⁹ Cf. *Meloni*, Visa Policy, p. 80 et seqq.; *Peers*, Institutional Framework, p. 20 et seqq.; *Peers*, Visas and Border Controls, p. 98 et seqq.; *Hailbronner*, Immigration and Asylum Law and Policy, p. 47 et seqq., 133; *Heimann*, Visa, Asyl und Einwanderung, p. 7 et seqq.

⁴⁰ At the time it was disputed if art. 100c EC Treaty of Maastricht gave the Community the competence to establish a “positive list” as well. This dispute has since been resolved by art. 62 EC Treaty, see below marg. no. 23

⁴¹ Regulation (EC) no. 2371/1995 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States, OJ L 234/1 (1995). See for background and legislative history of this regulation *Meloni*, Visa Policy, p. 75 et seqq.; see also *Peers*, Visas and Border Controls, p. 157 et seq.; *Garcia-Jourdan*, Liberté, sécurité, justice, p. 177 et seq.

⁴² ECJ, judgement of 10 June 1997, case C-392/95, EP v. Council, ECR (1997) I-3213. See *Meloni*, Visa Policy, p. 80; *Peers*, Visas and Border Controls, p. 99 et seq.; 157; *Garcia-Jourdan*, Liberté, sécurité, justice, p. 178.

⁴³ Regulation (EC) no. 574/1999, OJ L 72/2 (1999); for a discussion of this regulation see *Hailbronner*, Immigration and Asylum Law and Policy, p. 135 et seqq.

⁴⁴ Treaty of Amsterdam, Protocol integrating the Schengen acquis into the framework of the European Union, OJ C 340 (1997). See *Hailbronner*, Immigration and Asylum Law and Policy, p. 54 et seqq.; *Heimann*, Visa, Asyl und Einwanderung, p. 61 et seqq.; *ter Steeg*, Einwanderungskonzept, p. 87 et seqq.;

the exact content of the Schengen acquis,⁴⁵ and then designated the new legal basis according to the Treaty of Amsterdam for each rule having been identified as forming part of the acquis.⁴⁶ Compared to other areas covered by the Schengen acquis and later incorporated into the framework of the Union, this development was of less significance for the field of the common visa policy since – as mentioned above – art. 100c EC Treaty of Maastricht had already contained a (however limited) legal basis and secondary law had already been adopted prior to 1999.

23 The Treaty of Amsterdam established a new legal basis for the common visa policy in Title IV of the EC Treaty, art. 62 para. 2 lit. b) EC Treaty.⁴⁷ According to art. 62 para. 2 lit. b) (i), the Council was to adopt within five years following the procedure of art. 67 para. 3 EC Treaty⁴⁸ not only a “negative list”, but also a “positive list” of all third countries whose nationals were exempt from the visa requirement. Based on this provision, Regulation 539/2001 was adopted in March 2001.⁴⁹

24 Regulation 539/2001 has since been amended by a number of regulations and one Act of Accession. The following is a short overview of the most important amendments.⁵⁰

- Regulation 2414/2001⁵¹ exempted Romania from the visa requirement based on a report by the Commission and a decision by the Council.⁵²
- Regulation 453/2003⁵³ moved Ecuador from Annex II to Annex I in the light of the illegal immigration criterion,⁵⁴ changed the legal designation of East

⁴⁵ Council Decision 1999/435/EC of 20 May 1999, OJ L 176/1 (1999). According to art. 1 para. 2 of this decisions, the Schengen acquis was then published in the Official Journal, OJ L 239/1 (2000).

⁴⁶ Council Decision 1999/436/EC of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis, OJ L 176/17 (1999).

⁴⁷ See *Peers*, Visas and Border Controls, p. 100 et seqq., 155; *Heimann*, Visa, Asyl und Einwanderung, p. 21 et seq.

⁴⁸ See *Peers*, Visas and Border Controls, p. 102 et seq.

⁴⁹ For a detailed discussion of the background and legislative history of Regulation 539/2001 see *Peers/Rogers*, Visa Lists, p. 191 et seqq.; see also *Peers*, Visas and Border Controls.

⁵⁰ The individual amendments will be discussed in more detail when analysing the respective art. of Regulation 539/2001 below.

⁵¹ Council Regulation (EC) no. 2414/2001 of 7 December 2001, OJ L 327/1 (2001).

⁵² Cf. the first and second recital of Regulation 2414/2001. See also *Peers/Rogers*, Visa Lists, p. 194 et seq.; *Bigo/Guild*, Schengen Visa Policies, p. 236 et seq. Bulgaria on the other hand had already been removed from the negative list in April 2001; cf. seq. *Jileva*, Europeanisation, p. 25; *Bigo/Guild*, Schengen Visa Policies, p. 236 et seq.

⁵³ Council Regulation (EC) no. 453/2003 of 6 March 2003, OJ L 69/10 (2003).

⁵⁴ See *Peers/Rogers*, Visa Lists, p. 195. See also the comments to Annexes I and II below.

Timor from entity to state in Annex I and removed Switzerland either list as a consequence of the Agreement on the Free Movement of Persons between Switzerland, the EC and its Member States which provided for free movement without visas for nationals of Switzerland and for EU citizen.⁵⁵

- The 2003 Accession Treaty⁵⁶ provided for the removal of the ten new Member States from either list.
- Regulation 851/2005⁵⁷ introduced a new mechanism for the Commission to react to situations of non-reciprocity, for example to a third state listed in Annex II imposing a visa requirement on any of the EU Member States.⁵⁸
- Regulation 1791/2006⁵⁹ removed Romania and Bulgaria from the positive list by the date of their accession to the Union.
- Regulation 1932/2006⁶⁰ transferred a number of countries from one annex to the other,⁶¹ and clarified the conditions for exemptions from the visa requirements for refugees and stateless persons, school pupils, holders of certain passports other than ordinary passports and holders of local border traffic cards according to Regulation 1931/2006.⁶²
- Finally, with effect from 19 December 2009, Regulation 1244/2009⁶³ moved Macedonia, Montenegro and Serbia from Annex I to Annex II. For reasons of legal clarity, Kosovo was added to part 2 of Annex I, which is without prejudice to the status of Kosovo.

⁵⁵ Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, OJ L 114/6 (2002). See *Peers/Rogers*, Visa Lists, p. 188, 195; *Garcia-Jourdan*, Liberté, sécurité, justice, p. 180.

⁵⁶ Act concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, OJ L 236/725 (2002).

⁵⁷ Council Regulation (EC) no. 851/2005 of 2 June 2005, OJ L 363/1 (2006).

⁵⁸ See *Peers/Rogers*, Visa Lists, p. 189 et seqq., p. 195.

⁵⁹ Council Regulation (EC) no. 1791/2006 of 20 November 2006, OJ L 363/1 (2006).

⁶⁰ Council Regulation (EC) no. 1932/2006 of 21 December 2006, OJ L 405/23 (2006).

⁶¹ Cf. art. 1 para. 4 Regulation 1932/2006.

⁶² Regulation (EC) no. 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention, Corrigendum (consolidated version), OJ L 29/3 (2007).

⁶³ Council Regulation (EC) no. 1244/2009 of 30 November 2009, OJ L 336/1 (2009).

25 Regulation 539/2001 has not been affected by or included in the EU Code on Visas.⁶⁴

III. The establishment of a “negative” and a “positive” list (paras. 1 and 2)

26 **Art. 1 paras. 1 and 2** establish the distinction between third countries listed in Annex I whose nationals need a visa when crossing the external borders of the EU (“negative list”/ “black list”), and third countries listed in Annex II whose nationals are exempt from this requirement (“positive list”/ “white list”).

27 Annex I currently includes 126 states and three territorial entities, Annex II lists 37 countries and two special administrative regions of the Republic of China (SAR Hongkong and SAR Macao). The regulation fully harmonises these two lists for the participating Member States of the EU and states associated to the Schengen area (recital (12) Regulation 539/2001); the lists annexed to the regulation are exhaustive.⁶⁵

IV. Refugees and Stateless Persons Lawfully Residing in a “negative list”-Country

28 **Refugees and stateless persons who lawfully reside in a country listed in Annex I** also need a visa when crossing the external borders according to **art. 1 para. 1 subpara. 2**, unless the 1959 European Agreement on the Abolition of Visas for Refugees (hereinafter: 1959 Agreement)⁶⁶ provides otherwise.⁶⁷

29 The 1959 Agreement entered into force in 1969 and has currently been ratified by 22 States that are members of the Council of Europe.⁶⁸ According to art. 1 of the 1959 Agreement, refugees who are lawfully resident in the territory of a Contracting Party to the Agreement have the right – subject to reciprocity - to enter the territory of another Contracting Party without being obligated to obtain a visa, if they hold valid travel documents issued by the country of residence (art. 1 para. 1 lit. a) and the duration of their visit does not exceed three months (art. 1 para. 1 lit. b).

30 The reservation of the provisions of the 1959 Agreement is of little relevance today, since all but a few Contracting Parties to the 1959 Agreement are either Member States of the Union fully applying the Schengen rules, or associate members of the Schengen acquis, and the

⁶⁴ See marg. no. 3 above.

⁶⁵ Cf. *Bigo/Guild*, Schengen Visa Policies, p. 243 et seqq. See also the comments to Annex I and II below.

⁶⁶ European Agreement on the Abolition of Visas for Refugees, 20.4.1959, E.T.S. No. 031.

⁶⁷ Cf. *Peers/Rogers*, Visa Lists, p. 197. This section of art. 1 para. 1 subpara. 2 was originally contained in art. 3 of Regulation 529/2001 and then moved to art. 1 by art. 1 para. 2 of Regulation 1932/2006.

⁶⁸ France and the United Kingdom have, however, suspended the application of the agreement in 1986 and 2003 respectively.

recognized refugees residing in their territories are exempt from the visa requirement under art. 1 para. 2 subpara. 2, third indent of Regulation 539/2001.

31 Of the 27 EU Member States, only the United Kingdom and Ireland are not bound by Regulation 539/2001,⁶⁹ but have ratified the 1959 Agreement. The United Kingdom has, however, suspended the application of the 1959 Agreement in 2003.

32 Romania has also ratified the 1959 Agreement, but – even though it is an EU Member State and bound by Regulation 539/2001 – has not yet fully entered the Schengen area. The country is expected to become a full Schengen member in 2010-2011.

V. Nationals of “negative list”– countries who are automatically exempt from the visa requirement (para. 2 subpara. 2)

33 In certain cases, nationals of third countries listed in Annex I are automatically exempt from the visa requirement. **Art. 1 para. 2 subpara. 2** mentions three categories of persons:

- First indent: **Persons who are holders of local border traffic cards pursuant to Regulation 1931/2006.**⁷⁰

Regulation 1931/2006 introduces a local border traffic permit⁷¹ in derogation from the general rules governing the control of the external borders,⁷² since it is considered to be in the interest of the European Union to ensure that the borders with the neighbouring states do not constitute a barrier to trade, social and cultural interchange and regional cooperation.⁷³

Third country nationals who would normally be required to be in possession of a visa according to Regulation 539/2001 but who are regularly crossing the external borders in order to stay in a border area which does not extend to more than 30 kilometres from the border may qualify for a local border traffic card.

In addition to the general entry and issuance conditions in Chapter III of Regulation 1931/2006, bilateral agreements concluded by the Member States shall implement this

⁶⁹ Cf. recital 4 Regulation 539/2001.

⁷⁰ Regulation (EC) no. 1931/2006 of 20 December 2006 laying down rules on local border traffic at the external borders of the Member States and amending the provisions of the Schengen Convention; OJ L 405/1 (2006); Corrigendum, OJ L 29/3 (2007).

⁷¹ Art. 7 et seqq. Regulation 1931/2006.

⁷² Cf. the rules laid down in Regulation. 562/2006/EC of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105/1 (2006).

⁷³ Recitals 2 and 3 Regulation 1931/2006.

regulation⁷⁴ and lay down specific rules governing for example the maximum duration of stay under the local traffic regime.⁷⁵

- Second indent: **School pupils who are nationals of a country listed in Annex I but who are legally residing in an EU Member State and cross the border of another Member State for the purpose of a school excursion.**

Council Decision 94/795/JHA⁷⁶ lays down conditions under which school pupils are exempt from the general visa requirement attached to the country of their nationality: The pupil must be legally residing in a Member State, possess a valid travel document and be travelling as a member of a group of school pupils that is accompanied by a teacher from the school.⁷⁷ The accompanying teacher must be able to provide a list of the pupils and to document the purpose of the intended stay.⁷⁸

- Third indent: **Recognised refugees and stateless person who are legally residing in an EU Member State or an associate Schengen state.**⁷⁹

34 Since the Council adopted its decision on school pupils in 1994, the EU has significantly improved the legal position of third country nationals who are legally residing in an EU Member State in general and in the area of the right to travel within the Schengen area in particular.⁸⁰ According to art. 5 para. 1 lit. b) of Regulation 562/2006, nationals of third countries listed in Annex I do therefore not need a visa to cross the external borders or the (internal) border of another Member state if they hold a valid residence permit issued by an EU Member State or an associate Schengen Member as listed in Annex IV of the CCI.

35 Nevertheless, these exemptions from the visa requirement in art. 1 para. 2 subpara. 2, second and third indent Regulation 539/2001 were and are in certain cases still relevant during the

⁷⁴ Art. 1 para. 2 and art. 13 et seqq. Regulation 1931/2006.

⁷⁵ Art. 5 Regulation 1931/2006.

⁷⁶ Council Decision 94/795/JHA of 30 November 1994 on a joint action adopted by the Council on the basis of Article K.3.2.b of the Treaty on European Union concerning travel facilities for school pupils from third countries resident in a Member State, OJ L 327/1 (1994).

⁷⁷ Art. 1 Council Decision 94/795/JHA.

⁷⁸ Art. 1 lit. b), art. 2 Council Decision 94/795/JHA.

⁷⁹ This exemption from the visa requirement was originally contained in art. 3, but then moved to art. 1 para. 2 third indent by art. 1 para. 2 of Regulation 1932/2006.

⁸⁰ See on the status of third country nationals who are long-term residents in general *Peers/Rogers*, Immigration and Asylum Law, p. 615-660; *Boelaert-Suominen*, Non-EU nationals and Council Directive 2003/109/EC on the status of third-country nationals who are long-term residents, CMLR 2005, p. 1011-1052; *Handoll*, The Long-Term Residents Directive, in: European Yearbook of Minority Issues 2003, p. 389-406.

transition period of new Member States as long as they are not yet full Schengen members and their visas and residence permits are not yet recognized as equivalent.⁸¹ Even once a state is fully applying the Schengen rules, the exemption in art. 1 para. 2 subpara. 2, second indent can also be relevant for school pupils that are seeking asylum or international protection, since the residence permit that are issued to this category of persons does usually not entitle the holders to visa-free travel within the Schengen area in general.

VI. Visa requirements in the event of state successions (para. 3)

- 36 **Art. 1 para. 3** establishes a rule for the event that **third countries listed in Annex I or II** should **break apart**: The new successor state will automatically be listed in the same Annex as the former state until the Council decides otherwise by amending Regulation 539/2001.⁸²
- 37 Following the declaration of independence of Montenegro of 3 June 2006, the visa requirement applicable to the former state continued to apply. In December 2006, the Council amended Annex I by art. 1 para. 4 lit. a) (iv) of Regulation 1932/2006 and the reference to the Federal Republic of Yugoslavia (Serbia and Montenegro) was replaced by references to “Serbia” and “Montenegro”. Both states have since been moved to Annex II.⁸³
- 38 In the most recent case, the declaration of independence of Kosovo in February 2008, the European Union has yet to take an official position towards Kosovo’s status. Before Regulation 1244/2009 was adopted in November 2009, the visa requirement imposed on the former state – i.e. Serbia – continued to apply for nationals of Kosovo according to the rule set out in art. 1 para. 3 Regulation 539/2001. Art. 1 para. 1 lit. b) Regulation 1244/2009 then moved Kosovo to part 2 of Annex I (“entities and territorial authorities that are not recognised as states by at least one Member State”), whereas Serbia was moved to Annex II.

VII. Mechanism for the temporary restoration of the visa requirement in cases of non-reciprocity (paras. 4 and 5)

- 39 **Art. 1 paras. 4 and 5** Regulation 539/2001 expresses the great importance Member States attach to the criteria of by establishing **mechanism for a temporary restoration of the visa requirement** if a country listed in Annex II re-imposes such a requirement for nationals of any EU Member State.⁸⁴

⁸¹ Cf. Explanatory memorandum to the Commission’s original proposal, COM (2006) 84 final, p. 5.

⁸² COM (2000) 27 final, p. 6; see also *Peers/Rogers*, Visa Lists, p. 187.

⁸³ Art. 1 para. 2 Regulation 1244/2009

⁸⁴ See *Peers/Rogers*, Visa Lists, p. 187; *ter Steeg*, Einwanderungskonzept der EU, p. 399.

40 This mechanism was introduced by art. 1 of Regulation 851/2005, and replaced the original
mechanism established by Regulation 539/2001 that had proven to be ineffective and that had
never been applied.⁸⁵

41 Former art. 1 para. 4 Regulation 539/2001 provided that the Member State subjected to a visa
requirement by a third country listed in Annex II could notify the Commission. The visa
requirement for nationals of that third state would then have to be re-established provisionally
by all Member States unless the Council would decide otherwise acting by qualified majority.
The re-introduction of the visa requirement was to be published in the Official Journal, and
the Council and any Member State were given the right to request an amendment of the
annexes of Regulation 539/2001 in order to move the third country to Annex I.

42 The original mechanism turned out to be too rigid and failed to recognize the political
dimension of reciprocity and the negative implications for external relations the practically
automatic re-establishment of the visa requirement by all Member States could have.⁸⁶

43 According to **art. 1 para. 4** lit. a), the Member State concerned has to notify the Council and
the Commission of the introduction of the visa requirement within 90 days and this
information is to be published in the Official Journal. The obligatory notification and
publication of the introduction of the visa requirement are aimed at making information about
a non-reciprocal situation automatic and transparent.⁸⁷ The Commission will then – in
consultation with the concerned Member State – enter into negotiations with the third country
in order to restore visa-free travel (art. 1 para. 4 lit. b) Regulation 539/2001). After 90 days,
the Commission shall present a report to the Council. The Commission may also present a
proposal to temporarily restore the visa requirement for nationals of the third country on
which the Council shall then act within three months acting with qualified majority (art. 1
para. 4 lit. c), d) Regulation 539/2001). If the third country abolishes the visa requirement
again, the Member State concerned is to immediately notify the Council and the Commission.
Seven days after the publication of this notification, any temporary restoration adopted under
art. 1 para. 4 lit. c), d) Regulation 539/2001 shall terminate.

⁸⁵ Proposal for a Council amending Regulation (EC) no. 39/2001 as regards the reciprocity mechanism,
COM (2004) 437 final/2, p. 2; *Peers*, Visas and Border Controls, p. 160.

⁸⁶ COM (2004) 437 final/2, p. 2 et seq. See also *Meloni*, CMLR 2005, p. 1368; *Peers*, Visas and Border
Controls, p. 159 et seq.

⁸⁷ COM (2004) 437 final/2, p. 4.

- 44 **Art. 1 para. 5 Regulation 539/2001** obliges the Commission to submit a report to the Parliament and the Council every other year on any situation of non-reciprocity and to submit proposals for the amendment of Regulation 539/2001 if deemed necessary.
- 45 Since the entry into force of this new mechanism on 24 June 2005, the number of non-reciprocity cases between a third state listed in Annex II and one or more EU Member States or Schengen associates has fallen significantly⁸⁸ and the diplomatic approach of the new mechanism has proven to be effective.

⁸⁸ Cf. First report from the Commission to the Council on visa waiver reciprocity with certain third countries, COM (2006) 3 final; Second report from the Commission to the European Parliament and the Council on Cases where visa waiver Non-reciprocity is maintained by certain third countries, COM (2006) 568 final; third and fourth report from the Commission to the European Parliament and the Council on certain third countries' maintenance of visa requirements in breach of the principle of reciprocity, COM (2007) 533 final and COM (2008) 486 final/2.

Article 2

For the purposes of this Regulation, "visa" shall mean an authorisation issued by a Member State or a decision taken by such State which is required with a view to:

- entry for an intended stay in that Member State or in several Member States of no more than three months in total,
- entry for transit through the territory of that Member State or several Member States, except for transit at an airport.

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I. Definition of 'visa'

- 1 Art. 2 defines the **notion of "visa"** for the purpose of Regulation 539/2001 as a authorisation that entitles the holder for an entry into and sojourn in the Schengen area for a maximum of three months (art. 2 first indent).
- 2 Excluded from the scope of application of Regulation 539/2001 are therefore residence titles for longer stays; the competence to regulate entries and stays of more than three months remains with the Member States.

Nevertheless, the provisions of Directive 2003/109⁸⁹ need to be taken into account. Directive 2003/109 regulates the legal status of third country nationals who are long-term residents in a Member State, and approaches their legal status to the status of Union citizen (recital para. 2, Directive 2003/109) with the goal of strengthening the integration of third country nationals that have been legally residing in the EU for a longer period of time.⁹⁰ The directive regulates the conditions under which the status of a long-term resident in a Member State shall be given to or can be withdrawn from a third country national, as well as the rights attached to that status. The directive also contains rules on the status in Member States other than the one of which the third country national has been a long-term resident (art. 1 Directive 2003/109).

Directive 2003/109 does only apply to third country nationals that have been legally residing in a Member State for at least five years. The „first decision“ of a Member

⁸⁹ Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, OJ L 16/44 (2004).

⁹⁰ Cf. *Hailbronner*, Langfristig aufenthaltsberechtigte Drittstaatsangehörige, ZAR 2004, p. 163.

State to admit a third country national to its territory for more than three month remains in the competence of the Member State and is also not affected by Directive 2003/109.

II. Transit visas and airport transit visas

- 3 A visa within the meaning of art. 2 also includes the **authorisation to transit** through the territory of at least one Schengen state by land, but excludes transit at airports (art. 2 second indent).
- 4 The **exception of airport transit visas** is a result of a controversy about the scope of the competence conferred upon the EC by former art. 100c para. 1 EC Treaty. The Commission and the European Parliament held the view that rules on airport transit visas were covered by art. 100c para. 1, the Council on the other hand disagreed and proceeded to adopt the Joint Action on airport transit agreements.⁹¹ The Commission sought to annul the Joint Action, the European Court of Justice, however, supported the Council's view and upheld the Joint Action.⁹²
- 5 The Member States (including the United Kingdom and Ireland) remain bound by the Joint Action of 1996. At the Schengen level (and therefore excluding the U.K. and Ireland), the states could agree on a **“negative list” of third country nationals that need an airport transit visa**.⁹³ This list is found in Annex III of the Common Consular Instructions and was last amended on 9 February 2009. Certain Schengen states have waived the requirement for airport transit visa for nationals of selected third countries listed in Annex I of Regulation 539/2001 if they hold a valid visa for an EU Member State, an EEA Member State, Canada, Japan, Switzerland or the United States of America.⁹⁴

⁹¹ Council Joint Action 96/197/JAI of 4 March 1996 on the basis of Article K.3 of the Treaty on European Union on airport transit arrangements, OJ L 63/8 (1996).

⁹² ECJ, judgement of 12 May 1998, case C-170/96, *Commission v Council (Joint action regarding airport visas)*, ECR (1998) I-2763, paras. 22-24. For a discussion of the judgment and its implication for the jurisdiction of the ECJ on third pillar instruments see *Hailbronner*, Immigration and Asylum Law and Policy, p. 109 et seq.; 135; *ter Steeg*, Einwanderungskonzept, p. 398.

⁹³ Cf. *Meloni*, Visa Policy, p. 114.

⁹⁴ For example the Benelux countries, France, Germany, Italy and Spain for Ghanaian and Nigerian citizen, cf. CCI, Annex III, part 1.

Article 3

Repealed

- 1 Art. 3 has been repealed by art. 1 para. 2 of Regulation 1932/2006.¹ Regulation 1932/2006 moved the content of former art. 3 to the present art. 1 para. 1 subpara. 2, and Art. 1 para. 2, subpara. 2, third indent.

¹ Regulation 1932/2006 of 21 December 2006 amending Regulation (EC) no. 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 405/23 (2006).

Article 4

1. A Member State may provide for exceptions from the visa requirement provided for by Article 1(1) or from the exemption from the visa requirement provided for by Article 1. (2) as regards:

(a) holders of diplomatic passports, service/official passports or special passports in accordance with one of the procedures laid down in Articles 1(1) and 2(1) of Regulation (EC) No 789/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications.*

(b) civilian air and sea crew;

(c) the flight crew and attendants on emergency or rescue flights and other helpers in the event of disaster or accident;

(d) the civilian crew of ships navigating in international waters;

(e) the holders of laissez-passer issued by some intergovernmental international organisations to their officials.

2. A Member State may exempt from the visa requirement:

(a) a school pupil having the nationality of a third country listed in Annex I who resides in a third country listed in Annex II or in Switzerland and Liechtenstein and is travelling in the context of a school excursion as a member of a group of school pupils accompanied by a teacher from the school in question;

(b) recognised refugees and stateless persons if the third country where they reside and which issued their travel document is one of the third countries listed in Annex II;

(c) members of the armed forces travelling on NATO or Partnership for Peace business and holders of identification and movement orders provided for by the Agreement of 19 June 1951 between the Parties to the North Atlantic Treaty Organisation regarding the status of their forces.

3. A Member State may provide for exceptions from the exemption from the visa requirement provided for in Article 1 (2) as regards persons carrying out a paid activity during their stay.

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I. General remarks

- 1 Art. 4 para. 1 authorises Member States to derogate from the lists in Annex I and II and provide for **exceptions to the visa requirements or the exemptions thereof** as provided in

* OJ L 116, 26.4.2001, p.2. Regulations as amended by Decision 2004/927/EC (OJ L 396, 31.12.2004, p.45).

art. 1 paras. 1 and 2 Regulation 539/2001 for certain categories of persons.² The exceptions in art. 4 are formulated in a non-binding manner (Member States “may” exempt) and it is up to the Member States if they will make use of them – in contrast to the binding exceptions provided for in art. 1 para. 1 subpara. 2 and art. 1 para. 2 (Member States “shall” exempt).

2 Art. 4 para. 1 authorises exceptions to the visa requirements and the lifting thereof, whereas art. 4 para. 2 governs the lifting of the visa requirement and art. 4 para. 3 the possibility of re-introduction of such a requirement. The lifting of the visa requirement by one Member States for a national of a third country listed in Annex I must be recognized by the other Schengen states and result in the right to also freely enter their territories.

II. The implications of the principle of equality for the application of art. 4

3 The question needs to be asked if there are certain limits to the exercise of the discretion given to the Member States by art. 4, especially with respect to the lifting of the visa requirement for certain persons or certain groups of persons. Does the equality principle have to be respected in this context so that it is to be avoided that the visa requirement is lifted in one situation and not in a similar case?

4 The point of departure for answering this question must be the principle that the fundamental rights recognized in European Union law (including the principle of equality and the prohibition of discrimination)³ must also be respected when applying EU law, and when exercising a certain margin of discretion given to the Member States by EU law.⁴

5 In the present case, two considerations may be decisive:

- First of all, the wording of art. 4 para. 1⁵ favours the conclusion that the legislator wanted to provide for the possible lifting of the visa requirement for certain groups of persons and not only for certain individuals. The Member States can exempt entire

² See *Peers/Rogers*, Visa Lists, p. 187.

³ ECJ, judgement of 17 April 1997, case C-15/95, *Earl de Kerlast v. Union régionale de coopératives agricoles*, ECR (1997) I-1961, para. 35; ECJ, judgement of 10 May 1998, Case C-122/95, *Federal Republic of Germany v. Council*, ECR (1998) I-973, para. 54; ECJ, judgement of 17 July 1997, case C-354/95, *National Farmers' Union et al. v. England*, ECR (1997), I-4559, para. 61.

⁴ Cf. ECJ, judgement of 18 June 1991, case C-260/89, *ERT v. DEP et al.*, ECR (1991) I-2925, paras. 41 et seqq.; ECJ, judgement of 12 June 2003, case C-112/00, *Schmidberger v. Austria*, ECR (2003) I-5659, para. 69 et seqq.; particularly with regard to regulations ECJ, *Wachauf v. Federal Republic of Germany*, C-5/88, ECR (1989) 2609, para. 19; ECJ, judgement of 13 April 2000, case C-292/97, *Karlsson v. Sweden*, ECR, (2000) I-2737, para. 37.

⁵ In other language versions the wording is even clearer. As an example, the German version uses in art. 4 para. 1 „Personengruppen“ (groups of persons).

groups that fulfil the conditions mentioned from the visa requirement. An exemption of only some arbitrarily determined individuals of these groups would, however, violate the principle of equality.

- The same conclusion is applicable to the rules in art. 4 para. 2: The persons exempt from the visa requirement are to be determined in a manner that respects the principle of equality.

6 Against this background, a differential treatment of an individual is only justifiable by reasons that lie in the person or his or her behaviour as for example in cases when the person constitutes a risk to public order or security. This conclusion is a result of applying the fundamental rights recognized by EU law (cf. also art. 6 par. 1 TEU which includes the charter of Human rights into the framework of the European Union). Art. 4 grants individual rights as well as art. 1 para. 2 Regulation 539/2001 and for the same reasons as discussed above.⁶ Individuals concerned by an arbitrary application of the possible exceptions provided for in art. 4 must therefore be given the possibility to invoke a violation of these individual rights before the competent courts in the Member States.

III. Categories of persons for which Member States may provide derogations from the rules established in art. 1 (para. 1)

7 Art. 4 para. 1 authorises Member States to derogate from the lists in Annex I and II and provide for exceptions to the visa requirements or the exemptions thereof as provided in art. 1 paras. 1 and. 2 for certain categories of persons:⁷

- **Art. 4 para. 1 lit. a): Holders of diplomatic passports, service/official passports or special passports.**

Regulation 1932/2006 clarified that exemptions for this category of persons have to be introduced by following the procedures laid down in art. 1 and 2 of Regulation 789/2001.⁸

⁶ See commentary on art. 1, marg. no. 12 et seqq.

⁷ See *Peers/Rogers*, Visa Lists, p. 187.

⁸ Council Regulation (EC) no. 789/2001 of 24 April 2001 reserving the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications, OJ L 116/2 (2001). See the reasoning of the Commission, COM (2006) 84 final, p. 4.

Annex II of the Common Consular Instructions lays down special regulations for the holders of these types of passports, and generally speaking eases the restrictions on their right to enter and to move within the Schengen area on certain conditions. Schedule A and B of Annex II to the CCI list the visa requirements or the exemptions thereof for holders of such passports by each Schengen state. **Art. 4 para. 1 lit. b)-e):** The Member States may also derogate from the rules established by art. 1 paras. 1 and 2 with respect to civilian air and sea crew in general (art. 4 para. 1 lit. b) and/ or in the event of emergency, other helpers in the event of disaster or accident (art. 4 para. 1 lit. c), civilian crews of ships in international waters (art. 4 para. 1 lit. d) and officials of international organisations who are holders of a laissez-passer issued by said organisations (art. 4 para. 1 lit. e). For these exceptions, the Member States are not required to follow the procedures of Regulation 789/2001. The CCI do not contain any common rules regarding these categories of persons.

IV. Categories of persons that may be exempted from the visa requirement (para. 2)

8

Art. 4 para. 2 Regulation 539/2001 originally authorised Member States only to provide for exemptions from the visa requirement for school pupils travelling with a school group from a “positive list” country. Art. 1 para. 3 lit. b) of Regulation 1932/2006 amended this provision and it now authorises the Member States to exempt from the visa requirement three categories of persons:

- Art. 4 para. 2 lit. a): **School pupils who are nationals of a “negative list” – country but reside in a third country listed in Annex II** and cross the border of another Schengen state for a school excursion. This provision authorises Member States to provide for exceptions parallel to the one in art. 1 para. 2 second indent. Whereas according to the latter provision school pupils who reside in a Member State are automatically exempt, Member States are free to decide whether they also want to exempt school pupils who reside in a third country listed in Annex II. Regulation 539/2001 does not lay down any specific conditions for the exemption, but it would be expected that the same conditions as provided for in Council Decision 94/795/JHA would be applied.⁹
- Art. 4 para. 2 lit. b): **Recognized refugees and stateless persons residing lawfully in a third country listed in Annex II** may also be exempted from the visa requirement.

⁹ Cf. COM (2006) 84 final, p. 6.

- Art. 4 para. 2 lit. c): **Members of armed forces travelling on a N.A.T.O or Partnership for Peace missions.**

Art. III of the 1951 N.A.T.O. Agreement¹⁰ whose scope of application was extended by the 1995 N.A.T.O. and Partnership for Peace Agreement¹¹ exempts armed forces on such missions from visa regulations on entering the territory of a receiving state. The signatory states to these agreements¹² must comply with these exemptions, and a reference to these agreements has therefore been introduced by art. 1 para. 3 lit. b) Regulation 1932/2006 on the grounds of clarity and legal certainty.¹³

In order to benefit from the exemption from the visa requirements, the persons in question must hold an identification card and a movement order issued by an agency of the sending state or the N.A.T.O. as stipulated in art. III para. 2 of the 1951 N.A.T.O. Agreement.

V. Possible imposition of visa requirements on persons carrying out paid activities (para. 3)

- 9 Art. 4 para. 3 allows Member States to derogate from art. 1 para. 2 Regulation 539/2001 and impose visa requirements on nationals of third countries listed in Annex II if they are carrying out a paid activity during their stay.

¹⁰ Agreement concluded between the parties to the North Atlantic Treaty in London on 19 June 1951 regarding the status of their forces states that members of the armed forces.

¹¹ Agreement concluded in Brussels on 19 June 1995 among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces.

¹² As of 30 June 2009, of the 27 EU Member States and three Schengen associate states, only Norway is not a signatory state to either the 1951 Agreement or the 1995 Agreement.

¹³ Cf. COM (2006) 84 final, p. 6 et seq.

Article 5

1. Within 10 working days of the entry into force of this Regulation, Member States shall communicate to the other Member States and the Commission the measures they have taken pursuant to Article 3, second indent and Article 4. Any further changes to those measures shall be similarly communicated within five working days.
2. The Commission shall publish the measures communicated pursuant to paragraph 1 in the *Official Journal of the European Communities* for information.

Article 6

This Regulation shall not affect the competence of Member States with regard to the recognition of States and territorial units and passports, travel and identity documents issued by their authorities.

Article 7

1. Council Regulation (EC) No 574/1999* shall be replaced by this Regulation.
2. The final versions of the Common Consular Instruction (CCI) and of the Common Manual (CM), as they result from the Decision of the Schengen Executive Committee of 28 April 1999 (SCH/Com-ex(99) 13) shall be amended as follows:
 1. the heading of Annex 1, part I of the CCI and of Annex 5, part I of the CM, shall be replaced by the following:
"Common list of third countries the nationals of which are subject to the visa requirement imposed by Regulation (EC) No 539/2001";
 2. the list in Annex 1, part I of the CCI and in Annex 5, part I of the CM shall be replaced by the list in Annex I to this Regulation;
 3. the heading of Annex 1, part II of the CCI and of Annex 5, part II of the CM shall be replaced by the following:
"Common list of third countries the nationals of which are exempted from the visa requirement by Regulation (EC) No 539/2001";
 4. the list in Annex 1, part II of the CCI and in Annex 5, part II of the CM shall be replaced by the list in Annex II to this Regulation;
 5. part III of Annex 1 to the CCI and part III of Annex 5 of the CM shall be deleted.
3. The decisions of the Schengen Executive Committee of 15 December 1997 (SCH/Com-ex(97)32) and of 16 December 1998 (SCH/Com-ex(98)53, rev.2) shall be repealed.

Article 8

This Regulation shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Communities*.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

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I. General remarks

* OJ L 72, 18.3.1999, p.2.

1 Art. 5-8 contain the final provisions. Of importance are in particular art. 5 and 6, whereas art.
2 7 and 8 contain the above-mentioned amendments of the CCI, and the entry into force of the
3 regulation.

II. Communication of derogations made by individual Member States (art. 5)

2 **Art. 5 para. 1** should read « measures they have taken pursuant to art. 1 para. 1, subpara. 2,
3 and Art. 1 para. 2, subpara. 2, third indent and art. 4”. As mentioned above, art. 3 has been
4 repealed and its content moved to art. 1.

3 The provision is of great importance as it is expedient and necessary that all Member States
4 are informed accurately of the measures taken by the other participating states as the lifting of
5 the visa requirement or the re-introduction thereof has effect for all Schengen States.

III. The recognition of states and of foreign travel documents (art. 6)

4 **Art. 6** clarifies that the regulation only governs the visa requirements or the exemptions
5 thereof; the competence of **recognition of other states or entities** remains of course with the
6 Member States – notwithstanding the co-operation in the area of external relations.

5 The **recognition of foreign passports or other documents** is also not affected by Regulation
6 539/2001. This provision can, however, have the rather bizarre effect that certain travel
documents will be recognised by the authorities of one Member State whereas the authorities
of another Member States would not recognise them, which might result in different decisions
on the right to enter the Schengen area depending on which Member State will decide on the
visa application.

6 In such situation the question arises if a Schengen visa affixed to a document of a state or
territorial entity that is not recognized by all Member States will still entitle the holder of that
document or passport for visa free travel in the entire Schengen area including the territories
of Member States that do explicitly not recognize the state or territory of origin. The answer
has to be in the affirmative as it would be pointless to otherwise even list such states or
entities in the annexes of Regulation 539/2001.

ANNEX I

Common list referred to in Article 1 para.1

1. STATES

Afghanistan
Albania
Algeria
Angola
Armenia
Azerbaijan
Bahrain
Bangladesh
Belarus
Belize
Benin
Bhutan
Bolivia
Bosnia and Herzegovina
Botswana
Burkina Faso
Burma/Myanmar
Burundi
Cambodia
Cameroon
Cape Verde
Central African Republic
Chad
China
Colombia
Congo
Côte d'Ivoire
Cuba
Democratic Republic of the Congo
Djibouti
Dominica
Dominican Republic
Ecuador
Egypt
Equatorial Guinea
Eritrea
Ethiopia
Fiji
Gabon
Gambia
Georgia
Ghana
Grenada
Guinea
Guinea-Bissau
Guyana
Haiti
India

Indonesia
Iran
Iraq
Jamaica
Jordan
Kazakhstan
Kenya
Kiribati
Kuwait
Kyrgyzstan
Laos
Lebanon
Lesotho
Liberia
Libya
Madagascar
Malawi
Maldives
Mali
Marshall Islands
Mauritania
Micronesia
Moldova
Mongolia
Morocco
Mozambique
Namibia
Nauru
Nepal
Niger
Nigeria
North Korea
Northern Marianas
Oman
Pakistan
Palau
Papua New Guinea
Peru
Philippines
Qatar
Russia
Rwanda
Saint Lucia
Saint Vincent and the Grenadines
Samoa
São Tomé and Príncipe
Saudi Arabia
Senegal
Sierra Leone
Solomon Islands
Somalia

South Africa
Sri Lanka
Sudan
Surinam
Swaziland
Syria
Tajikistan
Tanzania
Thailand
The Comoros
Timor-Leste
Togo
Tonga
Trinidad and Tobago
Tunisia
Turkey
Turkmenistan
Tuvalu
Uganda
Ukraine
United Arab Emirates
Uzbekistan
Vanuatu
Vietnam
Yemen
Zambia
Zimbabwe

**2. ENTITIES AND TERRITORIAL AUTHORITIES THAT ARE NOT RECOGNISED
AS STATES BY AT LEAST ONE MEMBER STATE**

Palestinian Authority

Taiwan

Kosovo as defined by the United Nations Security Council Resolution 1244 of 10 June 1999

**3. BRITISH CITIZENS WHO ARE NOT NATIONALS OF THE UNITED KINGDOM
OF GREAT BRITAIN AND NORTHERN IRELAND FOR THE PURPOSES OF
COMMUNITY LAW:**

British overseas territories citizens who do not have the right of abode in the United Kingdom

British overseas citizens

British subjects who do not have the right of abode in the United Kingdom

British protected persons

ANNEX II

Common list referred to in Article 1 (2)

1. STATES

Andorra

Antigua and Barbuda*

* The exemption from the visa requirement will apply from the date of entry into force of an agreement on visa exemption to be concluded with the European Community.

Argentina
 Australia
 Bahamy*
 Barbados*

 Brazil
 Brunei Darussalam

 Canada
 Chile
 Costa Rica
 Croatia
 former Yugoslav Republic of Macedonia**
 Guatemala
 Holy See
 Honduras
 Israel
 Japan
 Malaysia
 Mauritius*
 Mexico
 Monaco
 Montenegro**
 New Zealand
 Nicaragua
 Panama
 Paraguay
 Salvador
 San Marino
 Serbia (excluding holders of Serbian passports issued by the Serbian Coordination Directorate (in Serbian: *Koordinaciona uprava*))*
 Seychelles*
 Singapore
 South Korea
 Svatý Kryštof a Nevis*
 United States of America
 Uruguay
 Venezuela

2. SPECIAL ADMINISTRATIVE REGIONS OF THE PEOPLE'S REPUBLIC OF CHINA

Hong Kong SAR***
 Macao SAR****

** The visa requirement exemption applies only to holders of biometric passports.

*** The visa requirement exemption applies only to holders of a "Hong Kong Special Administrative Region" passport.

**** The visa requirement exemption applies only to holders of a "Região Administrativa Especial de Macau" passport.

3. BRITISH CITIZENS WHO ARE NOT NATIONALS OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND FOR THE PURPOSES OF COMMUNITY LAW:

British nationals (overseas)

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I. Two exhaustive lists

- 1 The two lists in Annex I and Annex II are exhaustive, each state and certain territorial entities are attributed to either one of the lists. As of 10 January 2010, Annex I lists 126 states and three territorial entities not recognized as states by all Member States, Annex II lists 37 countries and two special administrative regions of the Republic of China (SAR Hongkong and SAR Macao).¹⁰⁸
- 2 Norway, Iceland and Liechtenstein are not listed in Annex II even though their nationals are exempted from the visa requirement. The visa exemption for these three countries flows from the agreement on the European Economic Area.¹⁰⁹
- 3 Switzerland was deleted from either list by art. 1 para. 2 of Regulation 453/2003 since the Agreement on the Free Movement of Persons between Switzerland, the EC and the Member States¹¹⁰ provides for free movement without visas for nationals of Switzerland and of the Member States.

¹⁰⁸ For a geographical overview of the countries in Annex I and II see *Peers/Rogers*, Visa Lists, p. 186 et seq.

¹⁰⁹ Decision 94/1/EC, ECSC of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation, OJ L 1/1 (1994). See also *Peers/Rogers*, Visa Lists, p. 186.

¹¹⁰ Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, OJ L 114/6 (2002).

4 Taking into account the 27 EU Member States, the three EEA states and Switzerland that are
not mentioned in either annex, Regulation 539/2001 lays down rules for 194 states, three
territorial entities and two special administrative regions.

II. The criteria for adding a country to the positive or negative list

5 The criteria based on which a third country will be added to the negative list in Annex I or the
positive list in Annex II are not found in art. 77 para. 2 a) TFEU itself. The decision to add
them to either list is therefore clearly of a political nature.¹¹¹

6 According to recital 5 of Regulation 539/2001 the determination is governed by a “case-by-
case assessment of a variety of criteria, relating *inter alia* to illegal migration, public policy
and security, and to the European Unions external relations with third countries, consideration
also being given to implications of regional coherence and reciprocity.” The proposal to
Regulation 539/2001, however, simply incorporated the lists almost in their entirety that the
Schengen states had already agreed upon on an intergovernmental level, which contradicts the
stipulation of a case-by-case assessment of each third country.¹¹²

III. Compatibility with EU Primary Law principles

7 The division of the third countries into two groups should, however, be compatible with
primary law: the EU legislator has to respect the principle of proportionality according to art.
5 para. 4 TEU, and further also needs to respect the EU’s fundamental rights including the
principle of equality and the principle of non-discrimination when adopting new pieces of
legislation. In this field, the EU legislator has, however, a rather large margin of discretion,
especially in view of the close connection between the attribution of the third states to either
list and the very politically charged area of the Union’s external relations.

8 Against this background, the classification itself does not appear to be in violation of the
above-mentioned principles of primary law, even though it implies a distinction of certain
groups of persons from others independent of the individuals’ characteristics. Nevertheless, a
more detailed statement of grounds for the attribution of a state to either list should be
considered: If the requirement of visas should actually reduce illegal immigration (which
seems to be one of the objectives of this regulation, cf. recital 5 of Regulation 539/2001), it
would be recommendable to give reasons for the assessment that there was a high risk of

¹¹¹ Cf. *ter Steeg*, Einwanderungskonzept, p. 399.

¹¹² See *Bigo/Guild*, Schengen Visa Policies, p. 242 et seq.; *Rogers/Peers*, Visa Lists, p. 197 et seq.; *Guild*, Visas
and Border Controls, p. 98 et seq.; *Meloni*, CMLR 2005, p. 1370 et seq.

illegal immigration from certain third countries and not from others, and if necessary what other factors were decisive for the attribution of a state to Annex I or II.

- 9 In view of the above mentioned rather large margin of discretion of the EU legislator as well as the rather low standard that the ECJ applies when examining the stated reasons on which the secondary measures are based (art. 296 TFEU),¹¹³ Regulation 539/2001 should be considered to be in conformity with primary law.¹¹⁴

¹¹³ Cf. seq. for example EJC, judgement of 22 June 2004, case C-42/01, *Portugal v. Commission*, ECR (2004) I-6079; ECJ, judgement of 10 December 2002, case C-491/01, *British American Tobacco v. England*, ECR (2002) I-11453, paras. 165 et seqq.

¹¹⁴ Very sceptical of the conformity with primary law are, however, Rogers/*Peers*, Visa Lists, p. 197 et seqq.